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CITATIONS

Cases:

688196—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

UNITED STATES OF AMERICA AND UNION CARBIDE CORPORATION, APPELLANTS

v.

B. J. BOYD, COMMISSIONER

AND

UNITED STATES OF AMERICA AND THE H. K. FERGUSON COMPANY, APPELLANTS

v.

B. J. BOYD, COMMISSIONER

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Tennessee (App. A, *infra*, pp. 1a–24a) is reported at 363 S.W. 2d 193.

JURISDICTION

1. These consolidated cases involve refund suits brought to determine the liability under the Tennes-

see Retailers' Sales Tax Act, as amended (Sections 67-3001 *et seq.*, 12 Tenn. Code Ann.), of Union Carbide Corporation and The H. K. Ferguson Company, for taxes on the use of tangible personal property in the performance of their management contracts with the Atomic Energy Commission. In each case the validity of the Tennessee statute was drawn in question on the ground of its being repugnant to the United States Constitution, but the Supreme Court of Tennessee upheld the statute.

2. The judgment of the Supreme Court of Tennessee was entered on December 7, 1962, and amended by decree on March 4, 1963 (App. A, *infra*, pp. 26a–28a). In each case, notice of appeal was filed in the Supreme Court of Tennessee on March 5, 1963, from the judgment and amended judgment. (C.R. 86–89; F.R. 86–89).[1]

3. The jurisdiction of this Court to review the judgment complained of by appeal is conferred by 28 U.S.C. 1257 and 2101. The following cases sustain the jurisdiction of this Court: *Phillips Co.* v. *Dumas School Dist.*, 361 U.S. 376; *City of Detroit* v. *Murray Corp.*, 355 U.S. 489; *United States* v. *Township of Muskegon*, 355 U.S. 484; *United States* v. *City of Detroit*, 355 U.S. 466; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110; *United States* v. *Allegheny County*, 322 U.S. 174.

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[1] "C.R." refers to the record in the Union Carbide case in the Tennessee Supreme Court. "F.R." refers to the record in the H. K. Ferguson Company case.

QUESTION PRESENTED

Whether, as construed and applied to tax the use of government-owned property by Union Carbide Corporation and The H. K. Ferguson Company in the performance of services under their contracts with the Atomic Energy Commission, the Tennessee Retailers' Sales Tax is unconstitutional because it violates the immunity of the United States from State taxation by imposing a tax upon the use by the United States of its own property.

STATUTE INVOLVED

The relevant portions of the Tennessee Retailers' Sales Tax Act (12 Tenn. Code Ann. Sections 67–3001 *et seq.*) are set forth in App. B, *infra*, pp. 29a–33a.

STATEMENT

This appeal involves refund suits brought by the United States, Union Carbide Corporation ("Carbide"), and The H. K. Ferguson Company ("Ferguson") against the Commissioner of Finance and Taxation of Tennessee (now Commissioner of Revenue) to protect the sovereign immunity of the United States from the imposition of Tennessee "sales and use" taxes upon the vast operations being conducted by the Atomic Energy Commission (AEC) in Tennessee, particularly at Oak Ridge. The actions will control the liability of Carbide and Ferguson for about $10,000,000 in accrued Tennessee use taxes on tangible personal property purchased, stored, used, or consumed under and in connection with the performance of their contracts with the Atomic Energy Commission. Under those contracts the United States pays any use taxes imposed upon the contractors.

1. CARBIDE

Carbide manages and operates the principal Atomic Energy Commission plants at Oak Ridge, Tennessee. The plants are a part of a complex of government-owned plants located in a number of States which are used to produce special nuclear material and to carry on research and development work in atomic energy under the Atomic Energy Acts of 1946 and 1954, as amended (C.R. 98–107; F.R. 313–322).

In June 1956, the pre-existing contract between Carbide and the Atomic Energy Commission was supplemented by Supplemental Agreement No. 37 (Exhibit C–8).[2] Under this contract, Carbide undertook the management, operation, and maintenance, on behalf of the United States, of the gaseous diffusion plant (a processing plant for Uranium–235); the Oak Ridge National Laboratory (a nuclear research center); and other important AEC facilities. The contract was one of the "management contracts" utilized by AEC in operating its large-scale industrial undertakings. Thus in the opening paragraph of Article I, the contract states:

> The Government expressly engages the Corporation to manage, operate and maintain the plants and facilities described below, and to perform the work and services described in this contract, including the utilization of informa-

[2] The history and background of the Oak Ridge complex and the contract with Carbide are set forth in detail in an earlier opinion of the Supreme Court of Tennessee in *Carbide & Carbon Chemicals Corp.* v. *Carson*, 192 Tenn. 150, 239 S.W. 2d 27 (1951).

> tion, material, funds, and other property of the Commission, the collection of revenues, and the acquisition, sale or other disposal of property for the Commission, subject to the limitations as hereinafter set forth. The Corporation undertakes and promises to manage, operate and maintain said plants and facilities, and to perform said work and services, upon the terms and conditions herein provided and in accordance with such directions and instructions not inconsistent with this contract which the Commission may deem necessary or give to the Corporation from time to time. In the absence of applicable directions and instructions from the Commission, the Corporation will use its best judgment, skill and care in all matters pertaining to the performance of this contract.

Prior to its association with the AEC, Carbide had no experience in the atomic energy field, and the primary purpose of the AEC in engaging Carbide was to utilize and gain the benefit of its management knowledge in business and in industrial-type operations. Policy decisions are made by the AEC and not by Carbide's home office; the relationship between AEC and Carbide is intended to be like that between the home office of an industrial concern and its branch offices. (C.R. 248).

Although Carbide exercises managerial discretion in many aspects of operations, the AEC has the right and authority to control, direct, and supervise the performance of its work in such manner and to such extent as it deems necessary or advisable, and it has exercised this right and authority, both in the broad

aspects of operations and administration and in many detailed, specific areas. (C.R. 141-143, 149). For the management of AEC facilities, properties, and funds, the AEC has established accounting, fiscal, procurement, property management, safety, security, and personnel policies with which Carbide is required to comply. (C.R. 149). These policies are not expressed in general terms; they are specific instructions stated in detail in the AEC Manual which consists of many thousands of pages setting forth with particularity the procedures which Carbide must follow. In addition, personal contacts, letters, and telephone calls were exchanged daily, thus further supplementing the detailed control exercised by the AEC. (C.R. 136, 335).

The operations carried on by Carbide in the AEC facilities at Oak Ridge are a part of a large and closely integrated industrial complex of the AEC located in a number of States. For the purpose of supervising and controlling these operations, including the work performed by Carbide and Ferguson, AEC maintains a large staff of government employees at Oak Ridge.[3] This staff determines for the entire system the amount of material to be processed; contracts for acquisition of raw materials; determines allocation of material to various processing sites; establishes rates of production, the types of products to be made, and the use of particular processes; transports or arranges for transportation of feed and process materials between the various facilities; procures the electric power needed; exercises direct control over source and special

[3] At the time of this litigation the staff consisted of almost 1,000 people. (C.R. 125).

nuclear material use; establishes research and training programs; and otherwise directs and coordinates the operations of the several management contractors involved. (C.R. 120–122).

Carbide has no investment in the Oak Ridge facilities. The only property of any kind owned and used by Carbide in the contract work consists of certain nitrogen storage tanks and related equipment under lease to the government, and eight automobiles.

2. FERGUSON

The contract with Ferguson was made in 1956. Ferguson agreed to perform various and unspecified construction-type activities for the AEC at Oak Ridge, including the building of some new facilities as well as the modification of existing facilities. The contract was necessitated by the rapidly changing needs for modifications of the facilities at Oak Ridge that required construction on short notice and adaptability to changes even during the course of a particular construction job. (App. A, *infra*, p. 3a.) The Supreme Court of Tennessee found that in many respects the AEC contracts with Carbide and Ferguson are identical. (App. A, *infra*, p. 3a.)

With respect to the Ferguson contract, the AEC retained primary responsibility for all construction programs, executed and administered all architect-engineer contracts, and established policies and procedures in both construction and engineering matters. (F.R. 107–112). AEC personnel were stationed in the same building which housed Ferguson's management personnel and directed Ferguson's operations on a

day-by-day basis. (F.R. 213, 223). Additionally, there were regular weekly discussions between AEC and Ferguson personnel at which the AEC staff scheduled specific jobs or directed reassignment of Ferguson manpower from job to job to meet changes in operating requirements. (F.R. 224). AEC personnel directed changes in construction methods used by Ferguson, authorized Ferguson to proceed on work or suspend work or to increase or decrease forces, and otherwise prescribed the manner of conducting work in minute detail. (F.R. 241–243).

As with regard to Carbide (C.R. 235), in addition to the control and supervision exercised over the operations as such, the AEC strictly controlled Ferguson's activities through budgetary provisions and through issuance of financial plans outlining in detail the work carried on and the money expended. (F.R. 115). This control extended to such matters as accounting and reporting, property management and procurement, personnel policies, engineering and construction, health and safety of the employees and public, and security. AEC staff personnel audited operations for compliance with required policies and procedures and gave specific instructions from time to time as to how to treat different transactions in accounting records. (F.R. 111 *et seq.*).

Ferguson does not own any of the property used by it in the performance of its contract. (F.R. 170).

3. PROPERTY USED BY CARBIDE AND FERGUSON.

In connection with the performance of their contracts, Carbide and Ferguson have acquired or

obtained for the account of AEC, or have been furnished by the AEC, tangible personal property of the kinds described as being taxable under the Tennessee Retailers' Sales Tax Act.

Thus, for example, Carbide has been taxed on the "use" of government-owned manufacturing equipment, component parts, office equipment, machine tools, computing machines, and various chemical and other products necessary for research activities. The Tennessee tax in fact applies to every item of government-owned personal property used by Carbide or Ferguson except for atomic materials, by-products and certain property owned by the United States prior to the time it is brought into Tennessee.

Neither Carbide nor Ferguson has ever had title to the property the use of which is taxed. Title to property procured by Carbide or Ferguson passed from the vendors directly to the United States; title to property owned by the government and furnished to Carbide or Ferguson remained in the government. The AEC advances the funds used in the operations carried on by Carbide and Ferguson. These funds, which remain government-owned until expended, are placed in a special bank account, designated as a Government Fund Account, in a bank certified as a depository for federal funds by the Treasury Department. (C.R. 348–349; Ex. F–1, p. 84). Finally, neither Carbide nor Ferguson is free to use the government-owned property on the use of which each is taxed except on behalf of and under the direction of the Atomic Energy Commission.

4. COMPENSATION PAID TO CARBIDE AND FERGUSON

Both Carbide and Ferguson are paid a fee for their services and neither sells its work product to the Atomic Energy Commission. In each case the fee is measured by the value of the contractor's services; neither company's fee or profit would be directly affected by a more or less efficient use of the government-owned property.

Carbide's annual fee is negotiated prior to each year's services on the basis of an estimate of the value of the services to be performed. At the time involved in this litigation, Carbide received a monthly fee of $229,250. (Exhibit C–8, p. 80.) Ferguson's compensation is negotiated semi-annually on the basis of the value of the services Ferguson has performed during the preceding six months. For example, for part of the period involved in this case, Ferguson performed work of an estimated cost of $542,130 for which a fee of $20,000 was agreed upon. (Exhibit F–1, pp. 70–71.)

5. THE STATE TAX ASSESSMENT

The Tennessee Retailers' Sales Tax Act imposes a sales or compensating use tax of 3 percent upon the value of tangible personal property sold within, or purchased outside but used within, the State. Sections 67–3003 and 67–3004 of the Act in addition imposes a tax of 3 percent of the value of tangible

personal property upon any contractor who uses such property in performance of his contract—

> whether the title to such property be in the contractor, subcontractor, contractee, subcontractee, or any other person, or whether the title holder of such property would be subject to pay the sales or use tax * * * unless such property has been previously subjected to a sales or use tax, and the tax due thereon has been paid.

Acting under this and related provisions, Tennessee assessed sales and use taxes against Carbide for July 1956 of $71,372 and against Ferguson for November 1956 of $12,107. The payments in both cases were made on April 30, 1958, out of funds provided by the AEC, and were made under protest. (C.R. 7–8; F.R. 7–8.) These assessments were based upon allegedly taxable procurements (the "sales" tax assessments) and uses (the "uses" tax assessments) of tangible personal property by Carbide and Ferguson under their contracts with the Atomic Energy Commission.

Carbide, Ferguson, and the United States brought suit for a refund in the State Chancery Court contending that the assessments were unconstitutional because Carbide and Ferguson at no time enjoyed the beneficial use of the property taxed and the procurement and use of tangible personal property under and in fulfillment of their contracts with the AEC were a procurement and use by and for the AEC as an agency and instrumentality of the United States. The cases were heard by the Chancellor upon the depositions of witnesses, stipulations of fact, oral

argument, and briefs. The Chancery Court entered separate decrees holding that, since Carbide and Ferguson were independent contractors and not servants and since both companies bought and used tangible personal property in the performance of their contracts with the AEC, they were subject to sales tax on their procurements and use taxes on other government property they used.

The Supreme Court of Tennessee held that although Carbide and Ferguson "are purchasing agents for the A.E.C. and, as such, their purchases are exempt from the Sales Tax because they are purchases by the Government," "[i]n the general performance of their contracts we find [Carbide and Ferguson] are independent contractors and, as such, are taxable on their private use of government-owned property" (App. A, *infra*, p. 24a). The court held, contrary to appellants' contentions, that the contractors' use of the government property in the performance of their contracts was a private use for their own gain, and therefore the application of the Tennessee tax to such use of the property was not an unconstitutional tax upon the government.

THE QUESTION IS SUBSTANTIAL

This appeal presents an important question of federal-state relationships involving the power of a State to impose a tax upon the use of property of the United States by contractors in the performance of management contracts with the federal government.

The present case itself involves a very large amount of money, and the rationale of the decision below would permit other States with comparable tax statutes to apply them to the vast amounts of government property used by contractors in the performance of similar management contracts. In these circumstances, plenary review by this Court of this substantial constitutional question is plainly in the public interest.

1. The Tennessee Retailers Sales Tax Act imposes a three percent tax upon the value of tangible personal property (no matter by whom owned) which is used by any contractor in the performance of his contract and on which a sales or use tax has not already been paid. The application of that tax to the federal property used by Carbide and Ferguson in managing and operating the AEC Oak Ridge installation violates the constitutional immunity of the United States from State taxation because the use of property upon which the tax is laid is a use solely for the benefit of the United States, and not for the private benefit of the contractors. The tax, therefore, is actually levied upon the government's use of its property in the conduct of government business. Basic principles of intergovernmental tax immunity preclude a State from levying such a tax.

A contractor paid for services on behalf of the United States cannot be taxed on the value of the government-owned property used in performing these services. That any such tax is a tax on the United States is well illustrated by an example given in the district court's decision in *United States* v. *Livingston*,

179 F. Supp. 9, 23 (E.D.S.C.), affirmed *per curiam*, 364 U.S. 281:

> The custodian of a federal post office building is paid for the performance of his duties, but his use of the materials he requires in the performance of his housekeeping duties is so completely that of the United States that no one would think of taxing him upon the value of the materials. * * *

This result plainly does not turn on a distinction between individual and corporate employment. A local express company hired at a monthly fee to manage and operate a post office on behalf of the United States could not be taxed on the use of the post office if all profit from the post office operations would belong to the United States. Similarly, a janitor in a government building cannot be taxed for the use of a government-owned waxing machine, and a corporation also paid a weekly fee to hire and supervise janitors cannot be taxed for the use of the same equipment.

In each case the tax is one upon the United States (although it purports to be upon a government employee and is collected from the employee) because it is a tax on the beneficial use of the property; and the United States, in each example, reaps all the benefits from the use of the property it owns. It is, of course, true that an employee may benefit indirectly by the employer's ownership of equipment. If the employer did not own the equipment (for example, the post office), there might be no job to be done or to be paid for (running the post office). But the State does not purport to—and no State has ever

attempted to—tax employees on these exceedingly remote benefits of the use of tangible personal property. It purports to tax only the privilege of using personal property for one's own personal purposes, either of immediate enjoyment or to create a work-product which one is then free to enjoy by use or sale. Where a private party is merely paid for his time and effort and does not sell, or own, or enjoy the work-product created by combining his services with government-owned equipment, a tax on the beneficial use of the property is a tax on the United States which, at all times, alone enjoys the benefits of this use.

2. The unconstitutionality of a tax such as that imposed in this case is highlighted by a comparison of the present case with the Michigan "use" tax cases decided during the 1957 Term.[4] In the Michigan cases, this Court held that a State may impose upon an independent contractor a use tax measured by the value of tax-exempt property used in the business of manufacturing products later sold in one case to third parties and in the other to the United States. In each case, a private party used government property to manufacture goods which it then sold for its own profit. Its profit from the sale of its product was the result of the application not only of its own work but also of the property it used. In short the contractor enjoyed the benefits of the use of government-

[4] *United States* v. *City of Detroit*, 355 U.S. 466, and *United States* v. *Township of Muskegon*, 355 U.S. 484. A companion case, *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, did not involve a "use" tax.

owned property. Therefore, the private contractor could be taxed on the privilege of using the capital assets owned by the United States. Here, in contrast, the payments received by Carbide and Ferguson are in no part attributable to the government-owned property which they are paid to manage and operate. Their payments are simply and entirely for their services; they cannot profit by any increase or decrease in production because of the efficiency or inefficiency of the government-owned equipment; they use this equipment because they are told to and are paid to, not because they want to, and not because they profit from the product this property helps to produce. Any benefits from the use of the government-owned property have always belonged to the United States, and any tax on the benefits of using this government property is a tax upon the United States, which alone enjoys the benefits of its use.

In the Michigan cases, the Court recognized the distinction we are now urging, and reserved for a future case the question here presented: In *United States* v. *Township of Muskegon*, 355 U.S. 484, 486-487, the Court emphasized that Continental, which used government property in the performance of supply contracts with the government, "was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them." The Court noted that Continental was "acting as a private enterprise selling goods to the United States. In a certain loose way, it might be called an 'instrumentality' of the

United States, but no more so than any other private party supplying goods for its own gain to the Government." It stated (355 U.S. at 486) "[t]he case might well be different if the Government had reserved such control over the activities and financial gain of Continental that it could properly be called a 'servant' of the United States in agency terms." In thus reserving the question, however, we do not believe that the Court intended to make immunity depend upon whether the private party was an "independent contractor" rather than a servant, as that distinction has developed in the law concerning a master's liability for the torts of a servant.[5] Rather, we suggest that the Court used the phrase "'servant' of the United States" as a shorthand phrase to describe a private party which was paid to perform services for the government, as distinguished from one who was "free * * * to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them."

3. The question left open in the Michigan cases and here presented—whether a State may tax a pri-

[5] In the Supreme Court of Tennessee, in addition to attacking the Chancellor's decision on the ground that Carbide and Ferguson were servants rather than independent contractors of the United States, we also argued that since Carbide and Ferguson were using the federal property solely for the benefit of the United States and not for their own benefit, the application of the Tennessee tax to such property constituted an unconstitutional tax upon the use by the United States of its own property. See Assignments of Error and Brief and Argument of Appellants, pp. 8–9, 11–12, 58–61, 78–82, 103–106. The court rejected both contentions (Appendix A, *infra*, pp. 18a–21a).

vate party's use of government property in the course of rendering services for the United States where the private party never owned or enjoyed the product of its services but was merely paid a fee for its time and efforts—was decided in favor of constitutional immunity in *Livingston* v. *United States,* 364 U.S. 281, affirming *per curiam,* 179 F. Supp. 9 (E.D. S.C.).

That case also involved a management contract with the AEC. Under this contract, the provisions of which closely resemble the management contract in the present *Carbide* case, the du Pont Company had agreed to construct and operate AEC plants and facilities located near Aiken, South Carolina, for the exclusive benefit of the United States. All the products produced or processed were at all times owned by the United States, as were all of the equipment, materials and supplies used in connection with such production. South Carolina's Tax Commission asserted that du Pont was liable for the payment of sales-or-use taxes upon the property it used on behalf of the United States. This Court affirmed the judgment of a three-judge district court, which had held that in these circumstances the South Carolina tax was a tax upon the United States, and not upon du Pont.

It is true that in the *Livingston* case, du Pont received no fee for its services and here the contracting parties received substantial fees. But that distinction is immaterial, since the fees received in the present case did not depend in any way upon how successfully the contractors utilized the government's property. Neither Carbide nor Ferguson could do anything in using that property which would result

in "maximizing its profits from them" (*Muskegon, supra*). Indeed, the district court in the *Livingston* case did not ground its decision upon the absence of reward for du Pont's services, a matter about which there was some dispute. It held that even if du Pont was viewed as having received substantial consideration for its services, it could not be taxed upon the use of government-owned property where, as here, the consideration received by the independent contractor was not related in any way to the value or the tax-exempt status of the property used. The court there said, "In a sense, of course, du Pont may be said to have the use of all the materials and facilities at the Savannah River Plant, but in the same sense it may be said that the individual members of the AEC have the use of all of the facilities entrusted to their care." 179 F. Supp. at 23. We submit that here, too, while Carbide and Ferguson may be said to have had the use of the government's materials and facilities, this use was no different from that which individual employees of the AEC have of the facilities entrusted to their care.

4. Even if, contrary to our contention, the existence of tax immunity turns upon whether the contractor is an independent contractor or a servant, we submit that, contrary to the decision below,* the rec-

* In an earlier case, *Carbide & Carbon Chemicals Corp.* v. *Carson*, 192 Tenn. 150, 239 S.W. 2d 27 (1951) *supra*, p. 4, n. 2, the Supreme Court of Tennessee had also held that under a similar management contract Union Carbide was an independent contractor and not a servant of the Atomic Energy Commission, but that its activities were expressly exempt from sales and use taxes under Section 9(b) of the Atomic Energy Act

ord in this case shows that Carbide and Ferguson, in the performance of their management contracts with the Atomic Energy Commission, were servants rather than independent contractors. This is a matter for decision by this Court which decides for itself the facts and conclusions upon which the constitutional issue turns. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121–122; *United States* v. *Allegheny County*, 322 U.S. 174. As summarized in the Statement, Carbide and Ferguson were required to follow extensive detailed directives and procedures prescribed by the Atomic Energy Commission, and they were subjected to daily control and supervision by Atomic Energy Commission personnel in both broad and specific areas of operations and administration. That the Atomic Energy Commission deemed it appropriate to rely upon the technical and managerial skill of these contractors and frequently issued directions in terms of results rather than of means to these results, does not negate an agency relationship. The most significant factor in determining the existence

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of 1946, c. 724, 60 Stat. 765 (42 U.S.C., 1952 ed., Sec. 1809(b)). This Court affirmed that decision on the basis of the statutory exemption, *sub nom. Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, but did not pass upon whether Union Carbide was a servant or independent contractor. Congress later repealed the exemption statute, but left the AEC, with respect to State and local taxation, entitled to the immunity granted by the Constitution, as interpreted by the courts. (Act of August 13, 1953, c. 432, 67 Stat. 575 and S. Rep. No. 694, 83d Cong., 1st Sess.)

of an agency relationship is not the principal's actual control (which was, in any event, considerable in this case) but its retention of the right to control the detailed aspects of the servants' duties. There is no doubt on the present record that the Atomic Energy Commission retained the right to control such aspects of the operations of Carbide and Ferguson.

5. The question is manifestly important to both the federal government and to the States. The amount at stake in the present case alone is extremely large. Although these test cases involve directly refunds of only $100,000 for a single month, the Atomic Energy Commission estimates that as a result of the decision below a past-due use tax in excess of $10,000,000 will be asserted by Tennessee [7] and, at the current level of operations, the future tax on the use of government-owned personal property in the Oak Ridge operation alone would be between $2,000,000 and $3,000,000 annually.

The importance of the present case far transcends the Tennessee tax liability, however. An affirmance of the decision below would expose the United States to constitutional State taxation on the use of vast amounts of its property by private parties under management contracts. During fiscal year 1962, for

[7] The government does not concede the applicability to this case of State statutes adding interest and penalty charges to the amount of taxes now asserted to be due. However, if these additional charges are held applicable despite our contrary contention, an additional liability of about $5,000,000 will result from the decision of the court below.

example, the Atomic Energy Commission alone had plants and equipment valued at in excess of $7,000,000,000 operated under management contracts. During this same period, management contractors of the Commission procured, or were furnished by the government with, over $1,000,000,000 in government-owned personal property. A decision with such far-reaching economic consequences calls for full review by this Court.

CONCLUSION

The question presented by this appeal is substantial and of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

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JUNE 1963.

APPENDIX A

Opinion of the Supreme Court of Tennessee

UNITED STATES OF AMERICA AND UNION CARBIDE CORPORATION

v.

B. J. BOYD, COMMISSIONER

AND

UNITED STATES OF AMERICA AND THE H. K. FERGUSON COMPANY

v.

B. J. BOYD, COMMISSIONER

Davidson Equity. Honorable Ned Lentz, *Chancellor*

OPINION

These two cases were consolidated and heard by the Chancellor and we shall render one opinion applicable to both cases. These suits were brought to recover certain taxes paid under protest, the taxpayers contending that they are not liable for Sales and Use Taxes under the Tennessee Retailers' Tax Act as amended. The Chancellor held the appellants were not entitled to recover and dismissed the suits. Appeals have been perfected and five assignments of error are directed to the action of the Chancellor in his order of dismissal.

In the year 1958 Union Carbide Corparation, called Carbide in this opinion, paid under protest the sum of $71,376.36 to the State of Tennessee and appellant, H. K. Ferguson Company, called Ferguson, paid under protest the sum of $12,107.52, both sums asserted by

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the appellee to be due and owing for Sales and Use Taxes for the month of July, 1956. Upon the payment of said sums each appellant, joined by the United States of America as a co-complainant, brought suit to recover the taxes. The briefs filed by the parties indicate that more than $4,000,000.00 is involved at the present.

It is contended by the appellants that (1) Carbide and Ferguson are agents and not independent contractors of the United States Government; (2, 3) that the taxes imposed are unreasonable and arbitrary and discriminate against the Federal Government; (4) that the Act does not tax use per se of tangible personal property; and (5) that the appellants are expressly exempt from the Sales Tax by virtue of Section 67-3004 T.C.A.

The facts of both suits are rather involved. The appellants contend that they are not liable for the Sales or Use Tax on tangible personal property used by them at Oak Ridge, Tennessee, pursuant to contracts with the Atomic Energy Commission.

The history and background of the Oak Ridge complex and the contract with Carbide was set forth in detail in an earlier case of Carbide & Carbon Chemicals Corporation v. Carson, 192 Tenn. 150, at pages 155-159, 239 S.W.2d 27 and, therefore, we do not think it necessary to repeat the same in full here. It is sufficient to say that in 1943 Carbide entered into a contract with the United States Government for the performance of certain experimental and production work at Oak Ridge as a part of a national research and development program whose immediate objective was the development of the atomic bomb.

In 1947 this contract was transferred to the Atomic Energy Commission (A.E.C.) and, as modified by

certain supplemental agreement, was in force during the period material to this litigation. Under this contract, Carbide's responsibilities were the management, operation and maintenance of the gaseous diffusion plant, a processing plant for Uranium-235; the Oak Ridge National Laboratory, a nuclear research center; and other important A.E.C. facilities.

The contract was one of many so-called "management contracts" utilized by the A.E.C. to provide the technical and managerial "know-how" needed by the Government in such a large-scale industrial undertaking.

The contract with Ferguson was made in 1956. In this contract Ferguson agreed to perform various and unspecified construction-type activities for the A.E.C. at Oak Ridge, including the building of some new facilities as well as the modification of existing facilities. Such a contract was necessitated by the rapidly changing needs for modifications of the facilities at Oak Ridge that required construction on short notice and adaptability to changes even during the course of a particular construction job.

In many respects the A.E.C. contracts with Carbide and Ferguson are identical, and both are cost-plus-fixed-fee arrangements. The important details of these two contracts will be discussed in this opinion.

We consider the major assignment of error in these consolidated cases to be:

> The Chancellor erred in holding that Carbide & Ferguson were independent contractors under their contracts with the Atomic Energy Commission.

In support of this assignment the appellants contend they are agents of the Federal Government engaged in the exercise of a privilege on behalf of said Government. Therefore, they claim to be immune

from state taxation by virtue of Article VI, Clause 2 of the Constitution of the United States, commonly called the "Supremacy Clause", as interpreted in a line of decisions beginning with M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579, in which Chief Justice John Marshall denied that the State of Maryland could impose a tax on an instrumentality of the United States stating that:

> The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequences of that supremacy which the Constitution has declared.

The argument advanced on behalf of the appellants is that as agents of the Government any tax upon them is a direct tax upon the Government and they are, therefore, within the implied immunity of the Federal Government from state taxation. On the other hand, the appellee vigorously contends that the relationship of appellants with the A.E.C. is that of independent contractors as was held to be the case in a very similar situation in Carbide & Carbon Chemicals Corporation v. Carson, supra.

As late as 1936 the United States Supreme Court adhered to a doctrine of absolute immunity, holding that if one sovereign is not subject to direct taxation by another, it also did not have to pay taxes indirectly, as by sales tax levied on private contractors doing business with the Government: Graves v. Texas Co., 298 U.S. 393, 56 S.Ct. 818, 80 L.Ed. 1236.

The first change in this attitude appeared in the decision in James v. Dravo Contracting Company, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, handed down

in 1937. In that decision a West Virginia sales tax levied on a contractor working for the U.S. was held valid, the Court holding that the contractor was not an instrumentality of the United States and that a tax upon the contractor was not a tax on the Government or its property. Thus simply doing business as contractor with the United States no longer gave immunity.

In 1941, the Court expressly overruled the Graves case, supra, and announced a marked change in the immunity decisions in Alabama v. King & Boozer, 314 U.S. 1, 62 S. Ct. 43, 86 L.Ed. 3, and the companion case of Curry v. United States, 314 U.S. 14, 62 S.Ct. 48, 86 L.Ed. 9. In the first case King & Boozer sold supplies to a cost-plus-fixed-fee government contractor for use in the performance of its contract. The State of Alabama asserted a sales tax which was unanimously upheld by the U.S. Supreme Court, holding that the contractor was not a purchasing agent for the Government, but was a purchaser in his own name with only the right to be reimbursed under the contract. The Court stated:

> So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity.
>
> * * * * *
>
> They (the contractors) were not relieved of the liability to pay the tax either because the contractors in a loose and general sense were acting for the Government in purchasing the

lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors.

In the companion case of Curry v. United States the same reason was applied as the Court unanimously upheld an Alabama use tax on material purchased by the contractor outside of Alabama. There the Court emphasized again that "the Constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government." 314 U.S. 14, 18, 62 S.Ct. 48, 49.

Thus in Bravo and King & Boozer, the Court specifically rejected the earlier "economic burden" test for immunity and replaced it with what has frequently been called the "legal incidence" test. By the latter, if the incidence of a tax is directly upon the U.S. or its agents, it is invalid by implied immunity, while any indirect tax is valid. Under this test the question of agent versus independent contractor becomes decisive.

Ten years after the Alabama cases, this Court was squarely faced with the same question in Carbide & Carbon Chemical Corporation v. Carson, supra, in which the Tennessee Sales and Use Taxes were asserted against certain A.E.C. contractors at Oak Ridge, one of whom was the appellant, Carbide in the instant case. In that case the Court said:

> The distinctions between an independent contractor and an agent are not always easy to determine, and there is no uniform rule by which they may be differentiated. "Generally the distinction between the relation of princi-

> pal and agent and employer and independent contractor is based on the extent of the control exercised over the employee in the performance of his work, he being an independent contractor if the will of the employer is represented only by the result, but an agent where the employer's will is represented by the means as well as the result." 2 C.J.S., Agency, § 2, p. 1027.
>
> The distinction generally between an independent contractor and an agent "depends upon the intention of the parties as expressed in the contract." (192 Tenn, page 160, 239 S.W. 2d page 31).

After a thorough study of the contracts and the facts involved, this Court held that the parties were independent contractors and were without constitutional immunity, but we also held that they were expressly immune from the taxes under the Atomic Energy Act of 1946, Sec. 9(b), 42 U.S.C.A. § 1809(b), which provided that the "activities" of the A.E.C. were exempted from taxation in any manner or form by any state or any subdivision thereof.

The U.S. Supreme Court affirmed on the basis of the Atomic Energy Act and, therefore, did not consider the question of implied immunity and relation of the parties. Carson v. Roane-Anderson, 342 U.S. 232, 72 S.Ct. 257, 96 L.Ed. 257 (1952).

In many of these cases the Court recognized that Congress could grant express immunity where it chose to do so. An expression of Congressional intent soon followed the Carson case when the legislative branch of the Federal Government amended the Atomic Energy Act by deleting the express immunity granted to A.E.C. "activities". The Senate Report accompanying this legislation reads, in part, as follows:

> The purpose of this legislation is to amend the Atomic Energy Act of 1946, as amended, by striking the last sentence of section 9(b)

> thereof which, as interpreted by the courts, affords to the Commission, and its contractors, an exemption from State and local taxation broader in scope than that generally enjoyed by all other departments and agencies of the Federal Government, and to place the Atomic Energy Commission on a basis identical to that of the rest of the Federal Government with respect to such taxation.

Thus Congress, mindful of the Federal-State relationship and desirous of maintaining State financial independence, quickly expressed an intent that the A.E.C. would be granted no greater immunity than other federal departments and agencies.

Within a few months after this congressional action, the U.S. Supreme Court handed down its decision in the case of Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 74 S. Ct. 403, 98 L. Ed. 546 (1954). In many respects this case was closely similar to the King & Boozer case. It involved private contractors in a joint venture who purchased two tractors in Arkansas for use in connection with their contract to build a naval ammunition depot. Arkansas levied a sales tax on the vendor, Kern-Limerick, who sued to recover the taxes. In striking down the taxes as invalid, the U.S. Supreme Court distinguished the case from King & Boozer in the following significant language:

> The contract here in issue differs in form but not in economic effect on the United States. The Nation bears the burden of the Arkansas tax as it did that of Alabama. The significant difference lies in this. Both the request for bids and the purchase order, in accordance with the contract arrangements making the contractors purchasing agents for the Government * * * contain this identical, specific provision:
>
> "3. This purchase is made by the Government. The Government shall be obligated to

> the vendor for the purchase price, but the Contractor shall handle all payments hereunder on behalf of the Government. The vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof." 347 U.S. 110, 119–120, 74 S. Ct. 403, 409.

The Court then stated that it found the purchaser under this contract was the United States and ruled that King & Boozer was not controlling for, though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States.

The Court in that case also said:

> Since purchases by independent contractors of supplies for Government construction or other activities do not have federal immunity from taxation, the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies, for decisions consistently prohibit taxes levied on the property or purchases of the Government itself. 347 U.S. 110, 122–123, 74 S. Ct. 403, 411.

The general distinction then between these two cases is the finding of an agency relationship between the Government and the contractor for the purchase of materials in the Kern-Limerick case. This finding was based upon (1) the terms of the contract, (2) the terms of the purchase orders, and (3) the actual practice of the Navy to exercise its reserved right to approve each request for bids and each purchase.

Emphasis was given to the form of the contract and purchase orders, and any motive to avoid taxation by employing the form used was held immaterial. Thus the Kern-Limerick case has been called the "outer limit" of the King & Boozer case.

This summary of the decisions has not been exhaustive, nor is the Kern-Limerick case the latest pronouncement on the subject, but it does outline the major steps in recent years. Other cases will be referred to as they apply to the questions presented.

We will now consider the facts and arguments in view of the foregoing background with respect to first the Sales Tax and then the Use Tax. The significance of this separation will appear subsequently. In determining whether or not the Sales Tax applies, it appears that in view of the King & Boozer and the Kern-Limerick cases the question of whether or not these appellants are agents or independent contractors of the A.E.C. appears controlling in considering the validity of the Sales Tax asserted. We shall now proceed to examine the contracts and the procurement methods practiced by the parties. A determination of their intentions expressed therein is necessary for this purpose.

The Carbide contract was supplemented by Agreement No. 37 in June, 1956. It was in effect, a complete re-write of the earlier contract for the purpose of "more clearly reflecting the intent and objectives of the agreement." Carbide states in its brief that this new contract in no way changed the method of operation between the parties. The parts of the contract here pertinent are these. Carbide is charged with the duty of procuring many materials, supplies, and services. It is to exert its best efforts to acquire materials, supplies, equipment and facilities necessary in the performance of the contract, but the Gov-

ernment retains the right to furnish any of these. It is to be reimbursed for all allowable costs. Payment for allowable costs is to be made with funds advanced by the Government by means of a special bank account. The corporation is not to use its own funds in these procurements. Title to all property passes directly from the vendor to the U.S. Government. These contract provisions appear to be identical with those in effect as early as 1950 or earlier.

Some changes were made in Carbide's purchase operations and order forms in 1954, that is, after the decision in the Kern-Limerick case. Payment is now made with Government funds whereas before the corporation was merely reimbursed. Terms and conditions conforming in many respects with those in the Kern-Limerick decision were added to the order form. At least four types of order forms are used, but no need is seen for distinguishing these. When purchases are made by Carbide the following is included among the terms and conditions attached to the order:

> It is understood and agreed that this Order is entered into by the Company for and on behalf of the Government; that title to all supplies furnished hereunder by the Seller shall pass directly from the Seller to the Government, as purchaser, at the point of delivery; that the Company is authorized to and will make payment hereunder from Government funds advanced and agreed to be advanced to it by the Commission, and not from its own assets and administer this Order in other respects for the Commission unless otherwise specifically provided for herein; that administration of this Order may be transferred from the Company to the Commission or its designee, and in case of such transfer and notice thereof to the Seller the Company shall have no further responsibilities hereunder and that nothing herein shall preclude liability of the Government for any

> payment properly due hereunder if for any reason such payment is not made by the Company from such Government funds.

The property was to be shipped to the A.E.C. in care of Carbide. Nowhere in the contract or the purchase order forms is there specific mention of "agency" and with the exception of the above quoted term or condition, the order would have every appearance of being from the Company for itself.

Carbide was generally free to make purchases up to $100,000.00 without prior approval, although this was not true with regard to certain specific items or materials named in the contract.

The Ferguson contract appears to be in every respect identical with that of Carbide in regard to the procurement of materials as shown above.

The procedure and order forms used by Ferguson in purchasing the property herein involved are identical to those of Carbide, except that Ferguson is limited to purchases of $10,000.00 or less without prior A.E.C. approval.

In the King & Boozer case, the important factors in holding that no agency existed and, therefore, upholding the sales tax, were that title passed first to the contractor and that the contractor could not bind the Government. In the instant case neither is true. Here, as in Kern-Limerick, the purchase orders specify that title passes to the Government, that payment is with Government funds, and that the Government is bound by the orders.

The distinguishing factors from Kern-Limerick are that here, as the appellee contends, many purchases are without prior approval and no specific use of the term "agency" or "purchasing agent" appears.

The decision of agency or lack of agency does not necessarily rest on these latter decisions. The mere

placing of terms such as agent or independent contractor in the contract does not make them such in law. The surrounding facts and circumstances determine the relationship.

It appears from the contract and from the actions of the parties that the relationship of agency in so far as the purchase of materials are concerned when accomplished in accordance with the contract bring them within the holding of Kern-Limerick and under that case the A.E.C. is the purchaser. Therefore, the Sales Tax would be a direct tax upon the Government and is valid under the doctrine of implied immunity, and we so hold.

Next the question of agency or independent contractor is equally important to a determination of the legal incidence of the Use Tax. It is the contention of the appellants that they are not only purchasing agents under their contracts, as we have been compelled to conclude, but that their whole relation to the A.E.C. under the contracts is that of agency. As agents, they argue that they are immune from state taxation of any privilege they exercise in the performance of their contracts.

The appellee again contends that in the general performance of the contracts, the appellants are independent contractors, even if they are agents of the A.E.C. for purchasing purposes.

To determine this question it is necessary to look more fully at the contracts in general.

Article I of the Supplemental Agreement No. 37 with Carbide provides:

> The Government expressly engages the Corporation to manage, operate and maintain the plants and facilities described below, and to perform the work and services described in this contract, including the utilization of information, material, funds, and other property of

> the Commission, the collection of revenues, and the acquisition, sale or other disposal of property for the Commission, subject to the limitations as hereinafter set forth. The Corporation undertakes and promises to manage, operate, and maintain said plants and facilities and to perform said work and services, upon the terms and conditions herein provided and in accordance with such directions and instructions not inconsistent with this contract which the Commission may deem necessary or give to the Corporation from time to time. In the absence of applicable directions and instructions from the Commission, the Corporation will use its best judgment, skill and care in all matters pertaining to the performance of this contract.

The introductory paragraphs of the contract state that:

> Such agreement arose out of the need for the services of an organization with personnel of proved capabilities, both technical and administrative, to manage and operate certain facilities of the Commission and to perform certain work and services for the Commission, and the Commission recognizes the Corporation as an organization having such personnel, and that the initiative ingenuity and other qualifications of such personnel should be exercised in providing such services under the agreement, to fullest extent practicable * * *

As indicated above, the contract with Ferguson states that it was necessitated by the need for rapid construction or modification of facilities at Oak Ridge. To prevent loss of time the A.E.C. entered into a general construction contract with Ferguson. At intervals not less frequent than six months, the parties were to negotiate supplemental agreements showing precisely what work had been done and fixing Ferguson's fee.

Under each contract, Carbide and Ferguson had the responsibility for hiring their own employees and administering their own contracts, though sub-contracting by Ferguson was subject to some control. Each was advanced funds from which to pay allowable costs, and each received a fixed fee for its performance.

Under the contract the A.E.C. retained the right of approval of certain employees and the right to require dismissal of employees deemed incompetent, careless, insubordinate, or whose employment was inimical with the public interest.

Under Carbide's contract, the A.E.C. controlled the amount of materials to be processed, exercised various controls over special nuclear materials, and approved the type and extent of research work done.

In connection with Ferguson's contract, the A.E.C. handled architect and engineer work separately and controlled the scheduling of specific jobs.

As to both Carbide and Ferguson, the A.E.C. further controlled budgets and financial plans, required detailed accounting and regulated health and safety procedures.

Looking at the facts presented by this record and at the contracts negotiated by the parties and their intent expressed therein, we have arrived at the same conclusion as we did in the earlier case of Carbide & Carbon Chemicals Corporation v. Carson, supra, in which the Court said:

> The nature of the plant operation is such that the government does not have on its staff or in its employ the technical means of qualifications to operate the plant. Each of the production plants is operated by a contractor who has considerable experience in the industrial operation of a chemical separation plant and Gaseous

> Diffusion plants, electromagnetic separation plants etc. * * *.
>
> We must hold that after making a rather thorough study the contracts * * * and the facts developed in this record that these contractors are independent contractors.

This does not mean that the Carson case is controlling here, but simply that the same conclusion has been reached for the same reasons.

It is clear from this voluminous record in the instant case that many controls are exercised by the A.E.C. over these appellants. The agency argues that the number and extent of these controls clearly indicate an agency relationship. It is, however, the nature of the controls which determine their effect.

Our examination of the record indicates that many of the controls enumerated by the appellants are nothing more than specifications for the "end result". Others are necessitated by the monopoly in atomic development and the duty to regulate the use of nuclear raw materials vested in the A.E.C.; the need for maximum security; the need for coordination of the Oak Ridge Operation with other A.E.C. projects, and the need for strict accounting for the use of public funds. These factors dictate extensive controls, yet within the framework of these controls the contractors remain independent in the sense that they are free to utilize their own experience and initiative in achieving the objectives or in the result of the Commission. In fact, the A.E.C. lacks the man power and facilities to perform these functions, and it is for this reason it entered into the contracts in question.

The A.E.C. chose to carry out its responsibilities by entering into contracts with private companies, thereby utilizing the extensive technical and managerial skills of these companies in an industrial type activity larger than any previously undertaken by the Govern-

ment. In the beginning these qualifications were unavailable among Government personnel. The use of private contractors has proven successful and the A.E.C. has elected to continue these relationships.

The record shows that the contract with Ferguson, a long-term contract with one construction company, was made only to allow construction in the least possible time. Just as was Carbide, Ferguson was chosen for its experience and "know-how" in its field and is free to utilize these skills to accomplish the objectives of the A.E.C.

The appellants argue strongly that we are bound to find an agency relationship under our decision in Roane-Anderson Co. v. Evans, 200 Tenn. 373, 292 S.W. 2d 398. That case, however, is not controlling here. It did involve a similar contract with the A.E.C. at Oak Ridge, but that contract repeatedly used the term "agent" in describing the relation of the parties. We held that we were not bound by that term but could look beyond it in determining the relation. Furthermore, the tax involved in that case was a gross receipts tax. We held that the receipts collected by Roane-Anderson belonged to the U.S. Government and, therefore, no tax could be levied directly on those funds.

The main contention of the appellants is that we are bound by the decision of the U.S. District Court in United States v. Livingston, 179 F. Supp. 9, affirmed without opinion, 364 U.S. 281, 80 S. Ct. 1611, 4 L. Ed. 2d 1719 (1959). That case involved a South Carolina sales and use tax upon Dupont Corp in its operations under a similar contract with the A.E.C. We are not persuaded that the holding of that case should be followed here, because both in the facts and the South Carolina and Tennessee taxing statutes substantial differences appear. There Dupont undertook to de-

sign, construct, and operate a plant for the A.E.C. for a fee of only $1.00. The Court in that case found that DuPont entered the contract from motives of public responsibility, and that it was the intention of the parties that DuPont would act as agent or "alter ego" of the A.E.C. in that project. The Court concluded that DuPont itself lacked a separate taxable interest.

We do not wish to ignore any patriotic motives that may exist, but we find in this record no indication that the appellant Carbide continues its contract or that appellant Ferguson entered its contract with any primary motive other than that of the normal business transaction. Carbide's yearly fee, above allowable costs, is $2,751,000.00 and Ferguson's fee, negotiated from time to time, is equally substantial as it appears in the supplemental agreements to the Ferguson contract. In addition, we feel that Carbide, contrary to DuPont in the Livingston case is deriving substantial indirect benefit that will enable it to maintain a position of industrial leadership as atomic energy finds more uses in non-defense fields.

After a very careful and thorough study of the contracts and the facts in this case, we conclude that both Carbide and Ferguson are independent contractors in the general performance of their contracts, though we are compelled, for the reasons shown above, to conclude that they have both been constituted agents for the special function of purchasing or procuring materials under their contracts.

Having decided that, except in the purchase of property, the appellants occupy a position as independent contractors of the A.E.C., the question remains whether the use tax is applicable to them.

In 1955 the Tennessee Retailers' Sales Tax Act was substantially amended by Chapter 242. Prior to that

time the use tax in this State was the customary complement to the sales tax which prevented evasion of the sales tax through importation of property from without the state. The 1955 amendments changed this by also taxing use by contractors as a privilege irrespective of the title of the property or its importation. T.C.A. §§ 67–3004, paragraph 2 provides:

> "Where a contractor or subcontractor hereinafter defined as a dealer, uses tangible personal property in the performance of his contract, or to fulfill contract or subcontract obligations, whether the title to such property be in the contractor, subcontractor, contractee, subcontractee, or any other person, or whether the title holder of such property would be subject to pay the sales or use tax, except where the title holder is a church and the tangible personal property is for church construction, such contractor or subcontractor shall pay a tax at the rate prescribed by § 67–3003 measured by the purchase price or fair market value of such property, whichever is greater, unless such property has been previosuly subjected to a sales or use tax, and the tax due thereon has been paid."

See also T.C.A. § 67–3017, paragraph 11, of which states:

> "The term 'dealer' is further defined to mean any person who uses tangible personal property, whether the title to such property is in him or some other entity, and whether or not such other entity is required to pay a sales or use tax, in the performance of his contract or to fulfill his contract obligations, unless such property has previously been subjected to a sales or use tax, and the tax due thereon has been paid."

The effect of these amendments is strongly challenged by the appellants. One contention is that the Act, as amended, does not tax use per se and does not

tax the activities of Carbide and Ferguson described herein. Under their construction of the Act, the use tax therein is nothing more "than the conventional complementary use taxes."

Such a construction, however, leaves the 1955 amendments without any force. We do not believe that they were intended as superfluous language or that the Legislature intended to do an idle thing by adopting said amendments. They expressly impose a tax upon the privilege of use by a contractor of tangible personal property, regardless of the title, where such property has not previously borne a sales or use tax.

In T.C.A. § 67-3004 a contractor is defined as a "dealer" which is further defined to be a person who uses tangible personal property, whether the title is in his or in another and whether the other has immunity or not in performing his contract, unless the property has borne such a tax. We think this was intended to be and is a tax upon the use per se by such a contractor.

It is complementary to the other provisions of the Act in that it places such a contractor on an equal basis with those who use property which has borne this privilege tax. It prevents private independent contractors from escaping the privilege tax merely because the property used in this private capacity was immune from such a tax when purchased by the Federal Government or its agent. It recognizes that in using the property, the contractor is not different from other private contractors.

The appellants cite examples in the Rules promulgated under the Act which they say exempt use similar to their use of the property in question. The cited instances (such as that a jeweler is not subject to a use tax on a watch when he repairs it) are

distinguishable because the exemptions therein are what is commonly known as labor or service charges which are not taxed under this Act. The Rules clearly contemplate that parts replaced and property, such as tools, used in the work shall bear the sales or use tax.

The remaining contentions of the appellants on this point argue in substance that a tax on their use of the property involved is a tax on use by the Government and is thereby unconstitutional. We think that this contention is fully met by our conclusion that the appellants are independent contractors and not agents. Thus the tax is on their private use for their own profit and gain, and not a tax directly upon the Government.

The tax appears to us to be similar in many respects to that upheld by the U.S. Supreme Court in United States v. Detroit, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424, and the companion Michigan cases, Detroit v. Murray Corp., 355 U.S. 489, 78 S.Ct. 458, 2 L.Ed.2d 441, and United States v. Township of Muskegon, 355 U.S. 484, 78 S.Ct. 483, 2 L.Ed.2d 436.

In United States v. Detroit, a Michigan property tax was asserted where exempt Government property was leased to a private contractor for use in its business for profit. In upholding the tax the Court said:

> "Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held. * * *
>
> "Here we have a tax which is imposed on a party using tax-exempt property for its own

'beneficial personal use' and 'advantage'." 355 U.S. 466, 471–472, 78 S. Ct. 474, 477.

In discussing the measure of the tax the Court said:

> Nevertheless the Government argues that since the tax is measured by the value of the property used it should be treated as nothing but a contrivance to lay a tax on that property. We do not find this argument persuasive. A tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been a commonplace in this country. * * * In measuring such a use tax it seems neither irregular nor extravagant to resort to the value of the property used; indeed no more so than measuring a sales tax by the value of the property sold. * * *
>
> A number of decisions by this Court support this conclusion. For example, in Curry v. United States, 314 U.S. 14, 62 S. Ct. 48, 86 L. Ed. 9, we upheld unanimously a state use tax on a contractor who was using government-owned materials although the tax was based on the full value of those materials. * * * 355 U.S. 466, 470, 78 S. Ct. 474, 476.

In United States v. Township of Muskegon, the same tax was upheld where the contractor was using the property in the performance of contracts with the Government.

A fortiori we think that a tax upon the privilege of use by a private contractor is not a direct tax upon the Government. Nor do we thing that the fact that these appellants are cost-plus-fixed-fee contractors makes their use any less beneficial and advantageous to them.

The appellants also contend that any use by them is within the express exemption of T.C.A. § 67–3004, which states:

> Provided, further, that notwithstanding § 67–3018, no sales or use tax shall be payable on account of any *direct* sale or lease of tangible personal property to the United States, or any agency thereof created by Congress, for consumption or use *directly by it through its own government employees.* (Emphasis supplied.)

This language contemplates direct sales to the Federal Government under customary procurement and fiscal procedures and the use of property directly by Government employees. By no stretch of the imagination can appellants be considered "employees" of the Federal Government. We hold this statutory exemption has no application to the facts of the cases at bar.

[9] Finally, the appellants contend that the tax imposed discriminates against those who deal with the U.S. Government and, therefore, against the Government itself. They argue that the State of Tennessee and its subdivisions are treated more favorably than the Federal Government. (We do not consider their contentions as to the sales tax since we have held that their purchases are immune.) Viewing the entire Act, we find this contention is without merit. All direct sales to or use by the Government or its agents are expressly exempt. The exemption afforded the State and its subdivisions is no broader. T.C.A. § 67–3012 provides only that:—"There shall also be exempted all sales made to the state of Tennessee or any county or municipality within the state."

The sole exceptions to the use tax here in question are where a contractor uses church-owned property under a contract for church construction and where a contractor uses state or federally owned property in the construction of electric generating plants. T.C.A. § 67–3004. Clearly this cannot be said to discriminate against the Federal Government. See United States of America and Olin Mathieson Chemi-

cal Corp. v. Department of Revenue of State of Illinois, D.C., 202 F.Supp. 757, affirmed without opinion 83 S.Ct. 117 (1962). In fact, the A.E.C. contractors receive more favorable treatment because use by them of atomic weapons parts, source materials, special nuclear materials, and byproduct materials, as defined by the Atomic Energy Commission Act of 1954, is expressly exempted by T.C.A. § 67-3004.

With the exceptions named above, the tax attempts to equate all of those who have a private beneficial use of exempt property with those who use non-exempt property in the same manner. We do not think it is arbitrary or discriminatory.

Consistent with the foregoing, we find that the appellants are purchasing agents for the A.E.C. and, as such, their purchases are exempt from the Sales Tax because they are purchases by the Government. In the general performance of their contracts we find they are independent contractors, and, as such, are taxable on their private use of government-owned property.

After a full consideration of all of the assignments of error, we conclude that the order of the Chancellor in dismissing these cases is correct; therefore, his action in so doing is affirmed at the cost of the appellants.

WELDON B. WHITE,
Justice.

Judgment of the Supreme Court of Tennessee

(Dated December 7, 1962)

No. 37,558

UNITED STATES OF AMERICA AND UNION CARBIDE CORPORATION

v.

B. J. BOYD, COMMISSIONER

Davidson Equity. Affirmed

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that the cause be dismissed.

All the cost of the cause will be paid by Union Carbide Corporation, Principal; and R. R. Kramer and Jackson C. Kramer, Sureties; for which let execution issue.

12/7/62

Amendatory Judgment of the Supreme Court of Tennessee

(Dated March 4, 1963)

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

No. 37,558

UNITED STATES OF AMERICA AND UNION CARBIDE CORPORATION, APPELLANTS

v.

B. J. BOYD, COMMISSIONER, APPELLEE

Davidson Equity

AMENDATORY JUDGMENT

This cause came on to be heard before this Court on a previous day upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, and after full consideration thereof this Court, on December 7, 1962, handed down its opinion therein.

And upon the same day, that is December 7, 1962, a judgment was entered of record in this case in Minute Book — at page —.

And it now appearing to the Court that in said judgment, as entered, there is an error apparent on the face of the record and that in the interest of justice and in order that said judgment will appear and be rendered and entered in accordance with the opinion of the Court and will correctly set forth the decision and determination of the Court herein, it is ordered and decreed by the Court that said judgment be amended and modified so as to read as follows:

The Court finds and adjudges that the appellant,

Union Carbide Corporation, in the purchasing of tangible personal property procured by it in accordance with its contract and in fulfillment of its contract obligations, is a purchasing agent for the Atomic Energy Commission, and the imposition of the Sales Tax thereon would be the imposing of a direct tax upon the Government of the United States and hence invalid. Therefore, such purchases are exempt from the Tennessee Sales Tax because such are purchases by the Government.

It is accordingly adjudged and decreed that the decree of the Chancery Court, insofar as that decree holds the appellant, Union Carbide Corporation, liable for such Sales Tax be, and the same hereby is, reversed.

It is further ordered, adjudged and decreed by the Court that so much of the decree of the Chancery Court as holds that there is no arbitrary discrimination in connection with the imposition of the Tennessee Use Tax against those who deal with the United States Government, and so much of said decree as holds that in the general performance of its contract with the Atomic Energy Commission, Union Carbide Corporation is an independent contractor and is taxable under the Tennessee Use Tax Statute on its use of Government owned tangible personal property in the performance of its contract, should be and the same hereby is affirmed.

It is further ordered, adjudged and decreed that so much of the decree of the Chancellor as dismisses appellants action be affirmed.

All costs of the cause will be paid by the appellant, Union Carbide Corporation, and R. R. Kramer and

Amendatory Judgment of the Supreme Court of Tennessee

(Dated March 4, 1963)

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

No. 37,558

UNITED STATES OF AMERICA AND UNION CARBIDE CORPORATION, APPELLANTS

v.

B. J. BOYD, COMMISSIONER, APPELLEE

Davidson Equity

AMENDATORY JUDGMENT

This cause came on to be heard before this Court on a previous day upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, and after full consideration thereof this Court, on December 7, 1962, handed down its opinion therein.

And upon the same day, that is December 7, 1962, a judgment was entered of record in this case in Minute Book — at page —.

And it now appearing to the Court that in said judgment, as entered, there is an error apparent on the face of the record and that in the interest of justice and in order that said judgment will appear and be rendered and entered in accordance with the opinion of the Court and will correctly set forth the decision and determination of the Court herein, it is ordered and decreed by the Court that said judgment be amended and modified so as to read as follows:

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It is further ordered, adjudged and decreed by the Court that so much of the decree of the Chancery Court as holds that there is no arbitrary discrimination in connection with the imposition of the Tennessee Use Tax against those who deal with the United States Government, and so much of said decree as holds that in the general performance of its contract with the Atomic Energy Commission, Union Carbide Corporation is an independent contractor and is taxable under the Tennessee Use Tax Statute on its use of Government owned tangible personal property in the performance of its contract, should be and the same hereby is affirmed.

It is further ordered, adjudged and decreed that so much of the decree of the Chancellor as dismisses appellants action be affirmed.

All costs of the cause will be paid by the appellant, Union Carbide Corporation, and R. R. Kramer and

Jackson C. Kramer, Sureties on its Appeal Bond, and for such costs execution will issue.

This March 4, 1963.

Judgment of the Supreme Court of Tennessee

(Dated December 7, 1962)

No. 37,559

UNITED STATES OF AMERICA AND THE
H. K. FERGUSON COMPANY

v.

B. J. BOYD, COMMISSIONER

Davidson Equity. Affirmed

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that the cause be dismissed.

All the cost of the cause will be paid by the H. K. Ferguson Company, Principal; and R. R. Kramer and Jackson C. Kramer, Sureties; for which let execution issue. 12/7/62

APPENDIX B

Tennessee Retailers' Sales Tax Act
(12 Tenn. Code Ann.).

67-3001. Short title—Additional tax.—This chapter shall be known as the "Retailers' Sales Tax Act" and the tax imposed by this chapter shall be in addition to all other privilege taxes.

67-3002. Definition of terms.—The following words, terms, and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except when the context clearly indicates a different meaning:

* * * * *

(h) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business.

* * * * *

(l) "Tangible personal property" means and includes personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, insurance, or other obligations or securities.

* * * * *

67-3003. Levy of tax—Rate.—It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who uses or consumes in this state any item or

article of tangible personal property as defined in this chapter, irrespective of the ownership thereof or any tax immunity which may be enjoyed by the owner thereof, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined in this chapter, or who leases or rents such property, either as lessor or lessee, within the state of Tennessee. For the exercise of said privilege, a tax is levied as follows:

(a) At the rate of three per cent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(b) At the rate of three per cent (3%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

(c) At the rate of three per cent (3%) of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, where the lease or rental of such property is an established business, or part of an established business, or the same is incidental or germane to said business.

(d) At the rate of three per cent (3%) of the monthly lease or rental price paid by lessee or renter, or contracted or agreed to be paid by lessee or renter, to the owner of the tangible personal property.

(e) At the rate of three per cent (3%) of the gross charge for all services taxable under this chapter.

(f) The said tax shall be collected from the dealer

as defined herein and paid at the time and in the manner as hereinafter provided.

(g) Notwithstanding other provisions of this chapter, tax at the rate of one per cent (1%) shall be imposed on machinery for new and expanded industry as hereinbefore defined in this chapter.

67–3004. Application of property by contractor.—

* * * * *

Where a contractor or subcontractor hereinafter defined as a dealer, uses tangible personal property in the performance of his contract, or to fulfill contract or subcontract obligations, whether the title to such property be in the contractor, subcontractor, contractee, subcontractee, or any other person, or whether the title holder of such property would be subject to pay the sales or use tax, except where the title holder is a church and the tangible personal property is for church construction, such contractor or subcontractor shall pay a tax at the rate prescribed by § 67–3003 measured by the purchase price or fair market value of such property, whichever is greater, unless such property has been previously subjected to a sales or use tax, and the tax due thereon has been paid.

* * * * *

Provided, further, that the tax imposed by this section or by any other provision of this chapter, as amended shall have no application with respect to the use by, or the sale to, a contractor or subcontractor of atomic weapon parts, source materials, special nuclear materials and by-product materials, all as defined by the atomic energy act of 1954, or with respect to such other materials as would be excluded from taxation as industrial materials under paragraph (e)2 of § 67–3002 when the items referred to in this proviso are sold or leased to a contractor or subcontractor for use in, or experimental work in connection with, the

manufacturing processes for or on behalf of the atomic energy commission or when any of such items are used by a contractor or subcontractor in such experimental work or manufacturing processes.

* * * * *

67-3005. Use tax on imports.—On all tangible personal property imported, or caused to be imported from other states or foreign country, and used by him, the "dealer" as defined in § 67-3017, shall pay the tax imposed by this chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

* * * * *

67-3016. Collection from dealers.—The aforesaid tax at the rate of three per cent (3%) of the retail sales price, as of the moment of sale, or three per cent (3%) of the cost price, as of the moment of purchase, as the case may be, shall be collectible from all persons, as defined in § 67-3002, engaged as dealers, as defined in § 67-3017, in the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of tangible personal property, or in the furnishing of any of the things or services taxable under this chapter.

67-3017. "Dealer" defined.—

* * * * *

The term "dealer" is further defined to mean any person who uses tangible personal property, whether

the title to such property is in him or some other entity, and whether or not such other entity is required to pay a sales or use tax, in the performance of his contract or to fulfill his contract obligations, unless such property has previously been subjected to a sales or use tax, and the tax due thereon has been paid.

U.S. GOVERNMENT PRINTING OFFICE: 1961

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 185

UNITED STATES OF AMERICA and UNION CARBIDE CORPORATION,
Appellants,
v.
B. J. BOYD,
Commissioner,
and
UNITED STATES OF AMERICA and THE H. K. FERGUSON COMPANY,
Appellants,
v.
B. J. BOYD,
Commissioner.

On Appeal from the Supreme Court of Tennessee.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT.

GEORGE F. McCANLESS,
Attorney General,
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St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

Cases Cited.

Statutes Cited.

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On Appeal from the Supreme Court of Tennessee.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT.

Appellee, or his successor in office, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal herein be dismissed, or that the final judgment and decree of the Supreme Court of Tennessee be affirmed, upon the ground that the question is so unsubstantial as not to warrant further argument.

QUESTION PRESENTED.

Whether the State of Tennessee may constitutionally impose upon appellants its use tax with respect to tangible personal property utilized by them in the performance of their cost-plus-a-fixed-fee contracts with the Atomic Energy Commission, title to the property so used being in the latter at the time used by appellants.

STATUTE INVOLVED.

The statute under which the tax in question was imposed is the Tennessee "Retailers' Sales Tax Act", as amended, which statute is codified as Chapter 30 of Title 67, Tennessee Code Annotated. Pertinent provisions thereof are set forth at pp. 29a-33a of the jurisdictional statement.

STATEMENT.

This litigation relates solely to the Tennessee sales tax as applied to contractors using tangible personal property in the performance of their contracts or the fulfillment of contract obligations in Tennessee. Appellants claim exemption therefrom upon the ground that they are agents or instrumentalities of the United States Government, specifically the Atomic Energy Commission.

The record shows that appellant Union Carbide Corporation (hereinafter referred to as Carbide) operates under a contract with the Atomic Energy Commission (hereinafter referred to as AEC) whereby it undertakes to manage, operate and maintain AEC's plants and facilities at Oak Ridge, Tennessee. Said contract has been in effect since 1947. It has been amended and supplemented on several occasions since then, but the basic operating relationship of the parties thereto has continued essentially unchanged since its initial negotiation.

Under the contract, the work of managing, operating and maintaining the AEC complex at Oak Ridge is to be accomplished by Carbide in accordance with general terms and conditions laid down by AEC. In the absence of directions and instructions from AEC, AEC engages Carbide to use its own best judgment, skill, and care to the fullest extent practicable. Carbide is not required to use its own funds in the performance of the work, but is authorized to utilize government funds set up in special accounts. The contract reserves to AEC numerous accounting, auditing and budgetary controls over the project, and there is frequent consultation between the top officials of Carbide and AEC, but the actual day-to-day operation of the project is intrusted to Carbide, which alone supervises its own employees.

Carbide receives from AEC over and above its costs $2,751,000 per year. Carbide's Oak Ridge operation is carried on by one of its operating divisions, known as the Union Carbide Nuclear Company. The sole function of this division is to perform Carbide's operating and management contracts with AEC. The record shows however that Carbide transfers employees freely between the Oak Ridge project and its other operating divisions, and that Carbide admits that the experience gained by its personnel at Oak Ridge is a thing of value to it in its private commercial operations. Additionally, Carbide sells uranium to AEC from its privately owned mines and plants; and it further, with prior specific AEC approval in each case, makes procurements for the Oak Ridge operation from its own private operating divisions.

Appellant H. K. Ferguson Company (hereinafter referred to as Ferguson) is a construction contractor engaged by AEC to perform miscellaneous specialized construction projects at Oak Ridge, both new work and repairs and alterations to existing structures and facilities. Its relationship to AEC under its contract is in all essential respects the same as that of Carbide to AEC, that is, AEC specifies the end result to be reached, leaving Ferguson in most respects free to achieve that result by its own means and methods. The day-to-day activities of Ferguson's personnel are supervised by Ferguson's own managerial staff. Ferguson's contact with AEC is at the managerial level only. Ferguson is paid a fixed fee by AEC, the amount of which is determined periodically by negotiation in accordance with the amount of work to be done.

Both Carbide and Ferguson are required in the course of fulfilling their contracts to procure many materials, supplies and services, which are subsequently utilized by them in the fulfillment of their contractual undertakings.

When such are required, title is taken in the name of the government. Under the contracts the government is free to procure needed materials itself and furnish same to the contractor, or to obtain them from government storage. As a general proposition, Carbide is authorized to make acquisitions up to the cost of $100,000 without prior AEC approval, and Ferguson's authority in this regard extends up to $10,000.

Under these facts, the Supreme Court of Tennessee held appellants to be independent contractors rather than agents of the United States Government, reaffirming the decision which it reached 11 years previously in **Carbide & Carbon Chemicals Corp. v. Carson,** 192 Tenn. 150, 239 S. W. 2d 27. The former decision was reviewed by this Court under the style of **Carson v. Roane Anderson,** 342 U. S. 232, 96 L. Ed. 257, in which this Court affirmed the decision of the Supreme Court of Tennessee insofar as it held that Carbide & Carbon Chemicals Corporation (identical to Carbide in the present case) was afforded special immunity from the Tennessee sales tax (and the complementary use tax) by § 9 (b) of the Atomic Energy Act.

In 1953 the Congress of the United States, in Public Law 83-262, repealed the aforesaid § 9 (b), with the obvious intent of placing AEC contractors upon the same state tax footing as other government contractors.

In the former case, this Court pretermitted any consideration of the question of agency, such not being necessary in view of the construction accorded § 9 (b) of the Atomic Energy Act.

In the former case, the Tennessee tax was sought to be imposed only with respect to procurements by the contractors of tangible personal property from Tennessee and foreign vendors for incorporation into their contracts. In

the instant cases, the tax was exacted on account of the use of tangible personal property by appellants in the performance of their contracts and the fulfillment of contract obligations, separate and apart from their procurements thereof. Upon this basis, the courts of Tennessee, both the trial court and the Supreme Court, sustained the tax.

I.

The Decision Below Is Clearly Correct.

The essence of the complaint made by appellants in this appeal is to the effect that the uses made by them of tangible personal property in the performance of their contracts were uses by the United States Government, hence immune from state taxation under the doctrine of implied constitutional immunity, and that a private person is not subject to a privilege tax measured by the value of government owned property where he has no beneficial interest therein.

It is submitted that under this record appellants are clearly contractors and not agents of the government. While it is recognized that labels are not controlling of the relationship between parties to an undertaking, it will not lightly be assumed by this or any other court that the United States Government has constituted as its agent a purely private entity. While its authority to do so is probably not open to question, it is a well-known fact that such arrangements are wholly contrary to history and prevailing philosophy in this country. It is not unreasonable to infer that wherever the government would constitute a private corporation as its agent for any purpose, the intent to do so would be spelled out clearly and unequivocally in its contract with said entity. In the instant cases, the contracts between appellants and AEC in no place refer to either appellant as an agent of the govern-

ment, or specify that the government is undertaking to confer upon private parties any attribute of its sovereignty.

To the contrary, the contracts in question repeatedly and throughout refer to each appellant as "contractor". Indeed, the contracts read in every respect the same as any contract entered into by the government with private persons or firms. If the relationship of agency was contemplated by the parties, or if such relationship were contemplated at the time of any of the numerous supplements or redrafts, it would have been a simple matter to spell out such intent by the use of some language carrying that import.

Apart from the matter of labels however, the contracts here make it quite clear that appellants were engaged because they possess in their fields knowledge, experience, and skills which were vitally needed by AEC, and not possessed by AEC's own personnel or others in the employ of the government. The contracts spell out that appellants are engaged to use their own skill, knowledge, experience and **best judgment** in achieving the ends specified and contemplated. AEC is very clearly not interested in the means employed by appellants, that is their relations with their working-level personnel, their techniques of operating, or their internal utilization of material and personnel (outside of course the realm of security). What AEC does want from Carbide and Ferguson is an end result, which is competent management of its properties and facilities and the realization of a finished product or products according to a desired timetable. This is the undertaking not of agents, but of independent contractors as the Tennessee Court found, wholly in line with the established authorities.

Appellants postulate that they have no beneficial interest in the uses made by them of tangible personal prop

erty in the performance of their contracts is entirely refuted by the record. The latter shows that both appellants derive very substantial fees for the services which they furnish. Neither is shown to be acting for any reason other than the normal business motivation. The substantial character of their fees is in fact underscored when it is reflected that they are not required to risk any of their own capital and can assign to profit virtually their entire remuneration from AEC.

Immediate financial considerations aside, appellants receive other vast tangible and intangible benefits from their connection with the AEC complex. That these are of great, indeed uncalculable, value cannot be denied. It cannot therefore be said with any candor that appellants are without beneficial interest in their contracts, or in the use of goods and materials required in the performance of such contracts.

It is now well-settled by this Court that a private contractor may be constitutionally held liable for a state tax upon the use of government owned property. **Alabama v. King & Boozer**, 314 U. S. 1, 86 L. Ed. 3; **Curry v. U. S.**, 314 U. S. 14, 86 L. Ed. 9; **U. S. and Borg Warner v. Detroit**, 355 U. S. 466, 2 L. Ed. 424; **U. S. v. Township of Muskegon**, 355 U. S. 484, 2 L. Ed. 2d 436; **Detroit v. Murray Corp.**, 355 U. S. 489, 2 L. Ed. 2d 441.

Likewise, this Court has held that a state privilege tax upon an incident other than use, can validly be measured by government owned property where the one exercising the privilege is a private party. **Esso Standard Oil Co. v. Evans**, 345 U. S. 495, 97 L. Ed. 1174. Nor is it material that the ultimate economic burden of a state tax upon a private person will fall upon the government, where the government has contractually agreed to assume such bur-

den. **Alabama v. King & Boozer, Curry v. U. S., Esso Standard Oil Co. v. Evans,** all supra.

The Tennessee tax in question is not merely the usual complementary use tax imposed as an adjunct to a sales tax upon the importation of goods from without the state for the purpose of use within the state. The instant tax, to the contrary, is a tax upon use per se, and particularly upon use by a contractor of tangible personal property in the performance of his contract or the fulfillment of his contract obligations. Sections 67-3003 and 67-3004, T. C. A. Such use is specifically declared to be a taxable incident without regard to who the contractee may be, or to any tax immunity which such contractee may enjoy. Pursuant to this statute, Tennessee taxes **without discrimination** uses of tangible personal property by federal contractors, state contractors, county contractors, municipal contractors and contractors with various educational religious, charitable organizations which are themselves exempted from taxation. The only exception made to this rule is in favor of church contractors, where title to the property used is in the church. Section 67-3004, T. C. A. This Court has recently held that such an exception does not make out a case of state discrimination against the federal government. **U. S. and Olin Mathieson v. Department of Revenue,** 202 Fed. Sup. 757, affirmed per curiam without opinion ..... U. S. ....., ... L. Ed. ....., 31 Law Week 3126, Oct. 15, 1962.

The Tennessee tax is therefore clearly upon the exercise of dominion over tangible personal property on the part of a private entity who has a beneficial interest of his own in such activity, even though the property may belong to the government at the time of such exercise. Such incident provides a valid occasion for the imposition of the tax within the clear purview of this Court's holdings. The Tennessee Supreme Court's holding to that effect is therefore without error and should be affirmed.

II.

There Is No Conflict of Decisions.

Appellants have pointed to the decision of a 3-Judge Federal District Court in South Carolina in the case of **U. S. A. & DuPont v. Livingston,** 179 Fed. Sup. 9, appeal dismissed without opinion by this Court, 364 U. S. 281, 4 L. Ed. 2d 1719, as being in conflict with the decision of the Tennessee Supreme Court.

Even a cursory examination of the DuPont opinion reveals that it is not parallel to the instant cases, the differences in fact and law being more than obvious. In that case, the private concern engaged by AEC received no compensation (actually $1.00 for some 8 years) and was so closely supervised by AEC as to amount to AEC's *alter ego*. Its authority was sharply delineated by the terms of the contract.

Quite apart however from the factual differences, all of South Carolina's effort to tax DuPont was upon the authority of its complementary use tax, which reached only **transfers of possession** of tangible personalty to DuPont for the account of AEC. South Carolina did not impose its tax upon use *per se* by a contractor. Of course, procurements made on behalf of the government by one who occupied the status of the government's *alter ego* would clearly be immune from taxation under the authority of **Kern-Limerick, Inc., v. Scurlock,** 347 U. S. 110, 98 L. Ed. 546.

It is therefore obvious that the South Carolina decision, and this Court's action in dismissing the appeal therein, are inapposite here.

III.

There Is No Important Question of Federal Law.

While the question raised in the Tennessee Courts in the instant cases may have been such as to warrant review by this Court a decade or two earlier, the situation today is that no federal interest is involved, as this Court has defined such interest in **Alabama v. King & Boozer, Esso Standard Oil Co. v. Evans** and the Michigan property tax cases hereinbefore cited. The conflict herein is one solely between a State and private parties, with no impact upon the federal government sufficient to make it cognizable in this Court, or of such character as to impede or embarrass federal-state relations. The only conceivable burden upon the federal government is an economic one which the government agency in question has voluntarily agreed to assume as between it and its private contractors. That such interest standing alone is not sufficient to invoke the jurisdiction of this Court has now been well-settled.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the appeal herein should be dismissed and the judgment of the Supreme Court of Tennessee affirmed.

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GEORGE F. McCANLESS,
Attorney General,

.....

MILTON P. RICE,
Assistant Attorney General,

.....

WALKER T. TIPTON,
Assistant Attorney General,
Counsel for Defendant.